UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FRANK T. BRUN, JR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-44-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

The plaintiff in this Social Security Disability ("SSD") appeal raises several issues: whether the administrative law judge properly evaluated the medical and vocational evidence; whether the administrative law judge was required to develop the evidentiary record further; whether the administrative law judge's evaluation of the plaintiff's credibility was supported by substantial evidence; and whether the residual functional capacity ("RFC") assigned by the administrative law judge was supported by substantial evidence. I recommend that the commissioner's decision be affirmed.

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 25, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had the severe impairments of congestive heart failure and obesity, but that neither impairment nor the impairments together met or equaled any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Finding 3, Record at 22; that the plaintiff's subjective allegations of debilitating fatigue, chest pain, shortness of breath and concentration problems were credible only to a limited extent, Finding 4, *id*.; that the plaintiff had the residual functional capacity to perform work at the sedentary level except for work that requires "frequent posturals," excess humidity, excess dust, fumes and gases, or excess hazards, Finding 5, *id*. at 23; that he was unable to perform his past relevant work, Finding 6, *id*.; that given his age (younger individual), education (high school and two years of technical training) and work history (no readily transferable skills), application of Rule 201.28 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") would direct a conclusion that he was not disabled, were it not for the limitations listed above, Findings 8-11, *id*.; that use of this rule as a framework for decisionmaking, with the nonexertional limitations noted, resulted in the conclusion that there were a significant number of jobs in the national economy that the plaintiff could perform, Finding 12, *id*.; and that the plaintiff therefore was not under a disability as that term is defined in the Social Security Act at any time through the date of the decision, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 7-8, making it the final determination of the commissioner, 20 C.F.R.§ 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by

such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff contends that the administrative law judge's "most blatant error" was his finding that the plaintiff could do full-time work at the sedentary level. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 8) at 2. He relies, *id*. at 2-5, on the records of his treating cardiologist,[2] Mark Thompson, M.D., who stated in a report dated January 31, 2002 that the plaintiff could stand or walk only one to two hours in an eight-hour day and sit for less than six hours, Record at 418-19, and a statement in the records of his primary care physician, Keith K. Buck, M.D., dated November 30, 2000, that the plaintiff was "unable to work," *id*. at 330. The plaintiff contends that the opinion of Oliver Caminos, M.D., a cardiologist who examined him on October 19, 2001, that "he should be able to perform sedentary work and work that requires a relatively low level of physical effort such as driving a truck, working at a desk and related functions, driving a car, and so forth," *id*. at 416, on which the administrative

[2] The administrative record indicates that Dr. Thompson saw the plaintiff four times, on June 22, 2000, June 14 and 18, (*continued on next page*)

law judge relied, *id*., at 19-20, is not inconsistent with these statements because Dr. Caminos "did not state whether or not Mr. Brun could work on an eight hour per day, five day per week basis," Statement of Errors at 4. To the contrary, the only reasonable interpretation of Dr. Caminos' statement is that he believed that the plaintiff could do sedentary work on a regular basis, as the term "work" is commonly understood, to involve an 8-hour day and 5-day week.

The statement attributed to Dr. Buck by the plaintiff appears to be the plaintiff's own statement to Dr. Buck, recorded by him during an appointment. Record at 330. After reporting basic data, the note states, "Unable to work. Pt. still very SOB on exertion, being followed by cardiologist Dr. [illegible]. Having marital problems 2° to E.D." *Id*. The initial statement in this series of items reported to Dr. Buck by the plaintiff cannot reasonably be construed to be Dr. Buck's conclusion,[3] unlike all of the other information recorded in that portion of the note.

The administrative law judge discussed fully his reason for rejecting Dr. Thompson's assertion that the plaintiff could sit for fewer than six hours per day and that "[h]e should not be immobile for extended periods of time," Record at 418, because "these restrictions are inconsistent with the claimant's own testimony," *id*. at 20. Contrary to the plaintiff's contention, this evaluation of the plaintiff's testimony did not require a "finding that the claimant's statements concerning his impairments and their impact on his ability to work were 'found to be exaggerated and not fully credible,'" Statement of Errors at 4; it merely gave full credit to some of the plaintiff's testimony, including that he had no difficulty sitting and his description of his activities of daily living. As the administrative law judge noted, Record at 20, his conclusion on this point

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2001 and October 12, 2001. Record at 377-78, 399, 404-05, 406.

[3] Even if the statement were appropriately characterized by the plaintiff, however, it would clearly be an expression of opinion on a question reserved to the commissioner. No "special significance" is accorded an opinion, even from a treating source, as to whether a claimant is disabled. *See* 20 C.F.R. § 404.1527(e)(1)-(3).

(*continued on next page*)

was supported by the state medical consultant, who reviewed the medical records other than Dr. Thompson's assessment of residual function capacity, Record at 386-95.[4] The administrative law judge's decision in this case complies with Social Security Ruling 96-8p, the other authority cited by the plaintiff. Statement of Errors at 5-6. For the reasons already stated, the administrative law judge did not err in interpreting Dr. Caminos' statement to refer to 8-hour-per-day work.

The plaintiff also attacks the administrative law judge's evaluation of his credibility. *Id*. at 18-20. He contends that "there is no accompanying explanation" for what he characterizes as an adverse credibility finding. *Id*. at 18. Specifically, the administrative law judge found:

> The claimant's subjective allegations, including those of debilitating fatigue, chest pain, shortness of breath, and concentration problems, when evaluated in accordance with Social Security Regulations 404.1529 and Social Security Ruling 96-7p, and when contrasted with the objective medical evidence of record, including the findings upon physical examination and diagnostic study, the claimant's course of medical treatment, the medical evidence of record, the claimant's activities of daily living, and the claimant's appearance and demeanor at the hearing, are found to be credible only to the extent that the clamant is limited to the residual functional capacity set forth in Finding No. 5.

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[4] Contrary to an additional argument made by the plaintiff, Statement of Errors at 12-15, the administrative law judge provided sufficient analysis of his reasons for rejecting Dr. Thompson's conclusion concerning the amount of time during which the plaintiff could sit, even though Dr. Thompson was a treating physician. The administrative law judge discussed substantial conflicting evidence that existed in the record, making it impossible to give the opinion controlling weight. 20 C.F.R. § 404.1527(d)(2). None of the authority cited by the plaintiff requires the administrative law judge to set forth in his opinion his specific application of each of the factors listed in 20 C.F.R. § 404.1527(d) when he decides not to adopt a particular conclusion of a treating physician. The opinion in this case adequately sets forth reasons for rejecting Dr. Thompson's conclusion about sitting hours; nothing further was required. In addition, contrary to the plaintiff's position, Statement of Errors at 15-18, there was no need for the administrative law judge to develop the record further in this regard. He did not "simply ignore[]" Dr. Thompson's view. *Id*. at 16. He fully discussed his reasons for rejecting it. Nothing in the record suggests that the administrative law judge did not understand why Dr. Thompson reached this conclusion or that Dr. Thompson's records contained a conflict or ambiguity that must be resolved, lacked necessary information, or otherwise did not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1512(e)(1). Nor does the plaintiff identify any gaps in the information provided in the report necessary to a reasoned evaluation of his claim. *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991). The plaintiff has failed to show that any further development of the record was required. *See Santiago v. Secretary of Health & Human Servs*., 944 F.2d 1, 5-6 (1st Cir. 1991).

Record at 22. In the body of his opinion, the administrative law judge specified the portions of the medical record that he found inconsistent with the specific subjective allegations listed and discussed the possibility of side effects from medication and the plaintiff's reported activities of daily living. *Id*. at 18-21. This presentation complies with the requirements of *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 23 (1st Cir. 1986), and Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) at 133-42. The plaintiff is not entitled to remand on this basis.

Finally, the plaintiff attacks the testimony of the vocational expert and the administrative law judge's reliance on that testimony. Statement of Errors at 6-12. Because the administrative law judge found that the plaintiff's ability to perform work at the sedentary level was limited by non-exertional factors, he was required to make an individualized determination concerning the availability of specific jobs that the plaintiff was capable of performing. Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003), at 156. In this case, the administrative law judge adopted the testimony of the vocational expert at the hearing that a person with the limitations identified by the administrative law judge could perform the sedentary jobs of mechanical assembler, assembler of small parts, security desk person, hand packer, surveillance monitor, general office clerk, data entry keyer and machine operator. Record at 21, 23. The vocational expert testified that there was no conflict between his testimony and the Dictionary of Occupational Titles ("DOT"), *id*. at 48, but that testimony appears to be incorrect. The analysis of this testimony is complicated by the fact that the vocational expert provided no citations to the DOT in his testimony. Any conflicts between a vocational expert's testimony and the DOT must be explained by the vocational expert or the administrative law judge. Social Security Ruling 00-4p ("SSR 00-4p"), reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003), at 243, 246. The administrative law judge's hypothetical question to the vocational expert did not include a

limitation to unskilled work, which is the only type of sedentary work that may be considered, because the administrative law judge found, Record at 23, that the plaintiff has no transferable skills, s*ee* SSR 96-9p at 155. Unskilled work is defined as work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time, usually 30 days or less. 20 C.F.R. § 404.1568(a). In the DOT, that definition corresponds to a specific vocational preparation level of 1 or 2. *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991), Appendix C.

For the job of mechanical assembler, the plaintiff offers DOT codes 733.687-014 (assembler of mechanical pencils and ballpoint pens) and 737.684-010 (assembler of mechanical ordnance) as the most likely counterparts. Statement of Errors at 8. Counsel for the commissioner agreed at oral argument that these were the only possibly relevant DOT codes. The first of these occupations is classified as light work and the second as medium, making them both inappropriate for an individual with a sedentary RFC. The second occupation has a specific vocational preparation level of 3, making it inappropriate for that reason as well.

For the job of assembler of small parts, the plaintiff offers DOT code 739.687-030 (assembler of small products II) as the "closest," but also offers 706.684-022 (assembler of small products I). Statement of Errors at 9. Counsel for the commissioner agreed with these choices. Both are classified as light work, making them inappropriate for a person with the RFC assigned to the plaintiff by the administrative law judge.

The plaintiff suggests that the closest DOT code for the next cited job, security desk person, is 372.667-034 (security guard). *Id*. at 9. Again, counsel for the commissioner agrees. The fact that this job is classified as light work makes it inappropriate as well.

For the hand packer job, the plaintiff notes that six jobs are listed in the DOT as packer jobs, but none with the title "hand packer." *Id*. All of the six jobs are listed at exertion levels higher than sedentary, however, making them inappropriate for the plaintiff under the circumstances of this case. *See* DOT codes 579.685-038 (insulation packer), 712.684-034 (denture packer), 737.687-094 (packer-fuser), 920.685-082 (automatic packer operator), 920.687-134 (agricultural produce packer), 929.684-010 (packer). Counsel for the commissioner disagreed with some of these choices, stating that the DOT includes at least ten jobs for packers with specific vocational preparation levels of 1 or 2, all of which are rated at the light exertional level. However the possible DOT codes are identified, none apparently has a sedentary exertion level, making all of them inappropriate.

The next listed job, surveillance monitor, is found at DOT code 379.367-010. It is classified as an unskilled job with a sedentary exertional level, making it appropriate for the plaintiff's RFC and lack of transferable skills.

The next listed job, general office clerk, is found at DOT code 209.562-010. It is classified as having a light sedentary level and a specific vocational preparation level of 3, making it inappropriate for the plaintiff.

Data entry keyer, the next job listed by the vocational expert, has no listing in the DOT. The plaintiff suggests that DOT code 203.582-054 (data entry clerk) is the most likely analog, Statement of Errors at 10, and counsel for the commissioner agrees. The DOT assigns this job to a sedentary exertional level but with a specific vocational preparation level of 4, making it inappropriate for the plaintiff.

The final job, called simply "machine operator" by the administrative law judge, Record at 21, appears in the transcript of the vocational expert's testimony as a "fielding machine operator [phonetic]," *id.* at 48. Counsel for the commissioner declined to agree with the plaintiff that this is likely to be a transcription

error. The plaintiff suggests that the vocational expert actually said "sealing machine operator," a job found in the DOT as code 641.685-074. Statement of Errors at 11. That job is also classified at the light exertional level, making it inappropriate for the plaintiff in this case. Counsel for the commissioner, after noting that many machine operator jobs are listed in the DOT, agreed that this job should not be considered further in connection with this appeal.

Counsel for the commissioner contended that the DOT is concerned with occupations that contain broad, general characterizations while a vocational expert's testimony is concerned with jobs within those categories, making the vocational expert's testimony more precise. She cited SSR 00-4p to support her contention that one-to-one comparison between jobs identified by a vocational expert and codes in the DOT was inappropriate. However, that Ruling states that

> [o]ccupational evidence provided by a VE or VS generally should be consistent with the occupational information supplied by the DOT. When there is an apparent unresolved conflict between VE or VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is disabled. At the hearings level, as part of the adjudicator's duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency.
>
> Neither the DOT nor the VE or VS evidence automatically "trumps" when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information.

SSR 00-4p at 244. Without a one-to-one comparison between the testimony and the DOT, there would be no check on the accuracy of the vocational expert's testimony. In this case, the vocational expert's testimony did not contain "information not listed in the DOT," *id*., that might explain the conflicts. Counsel for the commissioner offered no reason why any of the jobs listed by the vocational expert in this case that

do not appear upon comparison to the DOT to fit the plaintiff's residual functional capacity as described by the administrative law judge should be considered nonetheless to be jobs that the plaintiff could perform.

Left with only the surveillance system monitor job among those listed by the vocational expert as actually suitable under the DOT description, the discrepancies between the other listed jobs and the plaintiff's RFC and lack of transferable skills being unexplained, the plaintiff contends that the numbers of such jobs available given by the vocational expert, "40 locally; 150,000 nationally," Record at 48, is "far below the number required to be considered a 'significant number of jobs' as required by SSR 96-9p," Statement of Errors at 10. A single occupation is sufficient to meet the commissioner's burden at this stage of the sequential evaluation process. 20 C.F.R. § 404.1566(b). Courts have found sufficient numbers of jobs to exist in the local or regional economy at levels lower than 200. *E.g., Craigie v. Bowen*, 835 F.2d 56, 58 (3d Cir. 1987) (200 jobs in region); *Allen v. Bowen*, 816 F.2d 600, 602 (11th Cir. 1987) (174 jobs in local area; 1,600 jobs statewide; 80,000 jobs nationwide). *Cf. Salas v. Chater*, 950 F. Supp. 316, 320 (D. N.M. 1996) (133 jobs in state not significant number where plaintiff faced real obstacles in getting to and from work); *Mericle v. Secretary of HHS*, 892 F. Supp. 843, 847 (E.D. Tex. 1995) (870 jobs in state of Texas not significant number where state is second most populous in country and plaintiff incapable of traveling far distances); *Jimenez v. Shalala*, 879 F. Supp. 1069, 1076 (D. Colo. 1995) (250 jobs across state not significant number). The commissioner took the position at oral argument that the existence of more than 150,000 nationally was sufficient to meet the "significant number" requirement, regardless of the number of jobs available regionally. The regulations support this position. 20 C.F.R. § 404.1561 (jobs must exist in significant numbers in national economy, either in the region where claimant lives or in several regions of the country); 404.1566(a) (it does not matter whether work exists in the immediate area in which claimant lives).

At oral argument, counsel for the plaintiff urged the court to focus on the following language in 20 C.F.R. § 404.1566(b): "Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where you live are not considered 'work which exists in the national economy.' We will not deny you disability benefits on the basis of the existence of these kinds of jobs." The fact that only 40 of the relevant jobs exist in the region in which the hearing takes places does not necessarily mean that the other 49,960 of those jobs in the nation exist in relatively few locations, are isolated or exists in very limited numbers. There is nothing in the nature of the job at issue, surveillance monitor, that suggests that these jobs exist in only a few locations. Considering the factors listed in *Harmon v. Apfel*, 168 F.3d 289, 292 (6th Cir. 1999), the existence of 150,000 nationally is sufficient under the circumstances of this case. *See Edwards v. Secretary of Health & Human Servs.*, 1994 WL 259782 (D. N.H. Feb. 18, 1994) at *7. While I am troubled by the small number of surveillance monitor jobs available "locally," I conclude, particularly in the absence of evidence showing that the plaintiff is unable to travel, *see Lopez Diaz v. Secretary of Health, Educ. & Welfare*, 585 F.2d 1137, 1140 (1st Cir. 1978) (length and expense of commuting may not influence disability determination), that the existence of more than 150,000 nationally is sufficient to meet the "significant number" requirement.

The plaintiff contends that, regardless of the question whether a significant number of jobs may be found to exist which he may otherwise perform, the fact that the vocational expert testified that none of these jobs would allow the plaintiff to take a nap for an hour during the day precludes them from consideration. Statement of Errors at 12. The plaintiff testified that he took a nap every day at noon for about an hour. Record at 38. The vocational expert actually testified that an employee "wouldn't be able to" nap on the job, *id*. at 48, but that if a person wanted to nap on his lunch hour, he could do so, *id*. at 49. Assuming

arguendo that the plaintiff's characterization of the vocational expert's testimony is correct, the administrative law judge adequately explained his reasons for rejecting such a restriction. *Id*. at 22.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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